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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (Pet. App. 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on October 31, 1997 (118 S. Ct. 361). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 4461 provides:

> (a) General rule.—There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.—The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.—
>
> (1) Liability.—The tax imposed by subsection (a) shall be paid by—
>
> (A) in the case of cargo entering the United States, the importer,
>
> (B) in the case of cargo to be exported from the United States, the exporter, or
>
> (C) in any other case, the shipper.
>
> (2) Time of imposition.—Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—
>
> (A) in the case of cargo to be exported from the United States, at the time of loading, and

> (B) in any other case, at the time of unloading.

3. 26 U.S.C. 4462 provides, in relevant part:

> (a) Definitions.—For purposes of this subchapter—
>
> (1) Port Use.—The term "port use" means—
>
> (A) the loading of commercial cargo on, or
>
> (B) the unloading of commercial cargo from,
>
> a commercial vessel at a port.
>
> (2) Port.—
>
> (A) In general.—The term "port" means any channel or harbor (or component thereof) in the United States, which—
>
> (i) is not an inland waterway, and
>
> (ii) is open to public navigation.
>
> * * * * *
>
> (3) Commercial cargo.—
>
> (A) In general.—The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.
>
> (B) Certain items not included.—The term "commercial cargo" does not include—

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

STATEMENT

Approximately 4000 cases have been filed in the United States Court of International Trade to challenge the constitutionality of the Harbor Maintenance Tax, 26 U.S.C. 4461. More than 100 similar challenges to the tax are pending in the Court of Federal Claims. The present case was selected by the Court of International Trade as a test case for this litigation. The other similar suits have been held in abeyance pending the final disposition of this case.

1. The Harbor Maintenance Tax imposes a port use charge of 0.125 percent of the value of any commercial cargo that is loaded or unloaded from a commercial vessel in any port of the United States. 26 U.S.C. 4461(a). The tax applies without differentiation as to the origin or destination of the cargo. The incidence of the tax is simply upon "any port use" (*ibid.*).

The Harbor Maintenance Tax was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, which was the first legislation in over a decade to authorize the development of new harbor facilities. See S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 4, at 17 (1985); *User Fees for Ports and Waterways: Hearing Before the Senate*

Comm. on Finance, 99th Cong., 1st Sess. 16-20 (1985) (*Senate Hearing*). Prior to passage of the Act, port development projects in the United States had lagged behind those of other developed countries. Concern had been expressed that our deteriorating waterways contributed to the severe trade imbalance that then existed. H.R. Rep. No. 251, *supra*, Pt. 4, at 17; *Senate Hearing*, *supra*, at 20. In order to overcome objections to federal funding for harbor and port projects, the Harbor Maintenance Tax was adopted to ensure that such projects were funded by user fees rather than from general funds. See, *e.g.*, H.R. Rep. No. 251, *supra*, Pt. 4, at 23-24, 41, 42; *Senate Hearing*, *supra*, at 2, 6, 9, 19, 23-24; 132 Cong. Rec. 4921-4923 (1986) (Sen. Abdnor); *id.* at 4937-4938 (Sen. Moynihan); *id.* at 4940 (Sen. Stafford); *id.* at 4958-4959 (Sen. Bentsen).[1]

The Harbor Maintenance Tax provides funds for the necessary costs of maintaining and expanding channel and harbor facilities by "impos[ing] Federal user fees or charges on the beneficiaries of these expenditures." S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1985). Because the United States "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)), Congress determined to impose a nationally uniform fee on the "value of the cargo passing" through harbors (S. Rep.

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[1] During the hearings on this legislation, the Administration abandoned its opposition to federal funding of new water projects only upon the understanding that the costs for such projects would be paid by user fees rather than from general funds. *Senate Hearing*, *supra*, at 23.

No. 126, *supra*, at 9). The Senate Report on the Act explains that (S. Rep. No. 228, *supra*, at 5-6):

> [T]he ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantage among cargo types and U.S. ports which otherwise might result from user charges.

The Harbor Maintenance Tax is collected from the importer, exporter or other shipper whose cargo is loaded or unloaded in a port of the United States. 26 U.S.C. 4461(c)(1), (2). The charges thus collected are deposited in the Harbor Maintenance Trust Fund (26 U.S.C. 9505) and "may only be expended for harbor operations and maintenance" costs incurred on the shippers' behalf (Pet. App. 45a (Mayer, J., dissenting)). See 26 U.S.C. 9505(c).[2] The trustee of the Fund is required to invest the monies "in interest-bearing obligations of the United States." 26 U.S.C. 9602(b)(1). The interest earned on the bonds is paid to the Trust and is not retained in the general revenue accounts of the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3). The purpose of the Fund is to ensure that

[2] The Harbor Maintenance Tax was originally established at 0.040 percent of value. Pub. L. No. 99-662, § 4461, 100 Stat. 4266. In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11214, 104 Stat. 1388-436, it was increased to its current level of 0.125 percent. Before the rate of this port use charge was increased, the Harbor Maintenance Trust Fund provided approximately 40 percent of the necessary funds for the operation and maintenance of eligible channels and harbors. Pub. L. No. 99-662, § 210, 100 Stat. 4106. Since 1991, the Trust Fund has provided approximately 100 percent of those funds. Water Resources Development Act of 1990, Pub. L. No. 101-640, § 316, 104 Stat. 4641. See also note 8, *infra*.

the commercial users who are the principal beneficiaries of the costs incurred in developing and maintaining channels and harbors—rather than the general taxpaying public—pay the costs of these facilities. S. Rep. No. 126, *supra*, at 9.

The Harbor Maintenance Tax is collected by the United States Customs Service. Importers remit payments to the Customs Service along with payments of customs duties. Exporters and domestic shippers, who pay no duties, remit the tax to the Customs Service on a quarterly basis pursuant to 19 C.F.R. 24.24. The monies collected by the Customs Service are then transferred to the Harbor Maintenance Trust Fund pursuant to 26 U.S.C. 9505(b).

2. Respondent loads goods for shipment as exports in ports of the United States and, along with importers and domestic shippers, is therefore subject to the Harbor Maintenance Tax. After making several payments of this port use charge, respondent commenced this refund suit in the United States Court of International Trade. Respondent claimed that application of the Harbor Maintenance Tax to cargo loaded in a port of the United States for export violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5.

The Court of International Trade agreed with respondent that the Harbor Maintenance Tax imposes a prohibited tax on exports (Pet. App. 46a-89a).[3] The

[3] In enacting the Harbor Maintenance Tax, Congress specified that, "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. 4462(f)(2); see 26 U.S.C. 4462(f)(1). The Senate Report explained that "the Court

court rejected the government's contention that this statutory fee for "any port use" (26 U.S.C. 4461(a)) is a permissible charge for the use of port facilities. The court stated that "there is little indication that Congress intended to establish a user fee" (Pet. App. 56a) and that the "primary purpose of the [Harbor Maintenance] Tax is to raise revenue" (*id.* at 57a). The court reasoned that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance" and that the "fees collected * * * yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational" (*id.* at 58a). The court concluded that Congress impermissibly imposed a

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of International Trade is to have primary jurisdiction for actions involving the port user charge provisions." S. Rep. No. 228, *supra*, at 10. Respondent seeks a refund of payments for which it made a timely administrative protest with the Customs Service pursuant to the provisions applicable to customs duties (19 U.S.C. 1514, 1515). The government acknowledged that the Court of International Trade has jurisdiction in this case, for respondent's claim "contest[s] the denial of a protest" (28 U.S.C. 1581(a)). The Court of International Trade held, however, that, regardless of any protest, the court would have jurisdiction under 28 U.S.C. 1581(i) because respondent's claim was filed in that court within two years after the tax was paid. See Pet. App. 75a-76a; 28 U.S.C. 2636(i). That holding was affirmed by the Federal Circuit. Pet. App. 15a.

We have not sought review of that holding. Whether the jurisdiction of the court rests upon 28 U.S.C. 1581(a)—because respondent seeks review of a denial of a protest—or upon 28 U.S.C. 1581(i)—because this suit was commenced within two years of payment—has no relevance to the proper disposition of this case. That issue is of relevance only for other claimants, who have challenged the Harbor Maintenance Tax without first filing an administrative protest.

constitutionally proscribed "duty under the pretext of fixing a fee" (*id.* at 57a, quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

The court assumed, without deciding, that the statutory fee for "any port use" imposed by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) does not discriminate against exports. The court nonetheless concluded that, as applied to goods loaded for export, the tax violates the Export Clause because it is not fairly related to "the cost of the benefits port users receive from harbor maintenance and development projects" (Pet. App. 60a). The court stated that the port use fee imposed by the Harbor Maintenance Tax has yielded revenues "in excess of costs incurred" in operating and maintaining port facilities and that these funds may be "used to fund projects yet to be commenced, or even envisioned" (*ibid.*). The court reasoned that the charge is therefore "excessive in relation to the cost to the government" of providing port facilities (*ibid.*).

3. a. The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). Sitting as a five-judge panel in this case, the court of appeals affirmed the decision of the court below (Pet. App. 1a-30a), with one judge dissenting (*id.* at 31a-45a). The court held that the port use fee imposed by the Harbor Maintenance Tax is unconstitutional as applied to goods loaded for export from the ports of the United States.

The court of appeals noted that, under this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), a government fee exacted in connection

with the provision of services may constitutionally be applied to goods for export if the fee (i) does not discriminate against exporters, (ii) is based upon a fair approximation of use and (iii) is not excessive in relation to the costs incurred by the government in providing the services (Pet. App. 17a). Without addressing the first and third prongs of this test, the court concluded that the Harbor Maintenance Tax is unconstitutional as applied to goods for export because "there is no correlation between the amount of [the tax] an exporter pays and the amount the exporter uses the port" (*ibid.*).

The court of appeals gave three reasons for its conclusion. First, the court noted that the tax is imposed on and collected from the party who ships the goods rather than on "the ship owners" who are the "direct users" of the ports and harbors (Pet. App. 19a). Second, the court stated that, because the statutory port use fee is assessed on the *value* of goods being shipped, it lacks any reasonable connection with the cost or value of the benefits provided from use of the port (*id.* at 21a-22a). Third, the court found it objectionable that "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (*id.* at 22a).

The court rejected the government's contention that a fee based solely upon the use of a port is not a tax on an "[a]rticle of export" within the meaning of the Export Clause. The court reasoned that the fee falls on the goods, and not on the use of the port, because it "is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel" and

the "exporter, rather than the manufacturer, pays the tax" (Pet. App. 24a).

The court also rejected the government's contention that the Harbor Maintenance Tax is not a proscribed tax on exports because it constitutes a valid exercise of the power of Congress to regulate interstate and foreign commerce. The court concluded that the statutory fee on "port use" is not a regulation of commerce because the fee "regulates nothing" (Pet. App. 27a). The court stated that the Harbor Maintenance Tax does not regulate commerce because "[i]t is not designed to reduce the overall use of the ports" and because "the government has not persuaded us that the [tax] is designed to simply recoup the costs of the services" provided to users of ports and harbors (*ibid.*).

b. Judge Mayer dissented. He noted that a user fee differs from a tax because "a tax is enacted to raise revenue 'to go to the general support of the government,' see *Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services" (Pet. App. 32a). Based upon the text and the extensive legislative history of the statute, Judge Mayer concluded that the Harbor Maintenance Tax is a constitutionally valid fee for the use of harbor facilities that satisfies all three prongs of the test established by this Court in *Massachusetts* v. *United States*, 435 U.S. at 464, 466-470.

First, Judge Mayer disagreed with the majority's conclusion that a fee assessed equally against exporters and all other shippers for the use of the ports of the United States is constitutionally infirm because the parties who must pay the fee are not the "direct beneficiaries" of the services that the

government provides. He noted that this conclusion is illogical as a matter of economics and also "flies in the face of Congress' finding that exporters are the direct beneficiaries" of port services (Pet. App. 42a). Because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statute, Judge Mayer emphasized that "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (*ibid.*).

Judge Mayer also rejected the majority's conclusion that the Harbor Maintenance Tax is not fairly related to the costs incurred by the government in providing and maintaining port facilities (Pet. App. 39a-45a). It was expressly to avoid discrimination among ports and port users that Congress chose to allocate the costs of providing these services under a nationally uniform charge based upon the value of goods shipped (*id.* at 39a). Judge Mayer concluded that the Constitution does not require Congress to calculate the port use fee separately for each port, because "[e]very exporter has all ports and harbors available to it" (*id.* at 40a).

SUMMARY OF ARGUMENT

The Harbor Maintenance Tax is a constitutionally permissible fee on the use of the ports of the United States. This Court has consistently held that "revenue measures that operate only to compensate a government for benefits supplied" are not proscribed by the Export Clause of the Constitution, for the government "has an obvious interest in making those

who specifically benefit from its services pay the cost." *Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978).

The Harbor Maintenance Tax requires those who specifically benefit from use of the Nation's ports to bear the costs of such facilities. The fee is imposed without discrimination upon exporters, importers and domestic shippers who use ports of the United States. The fees collected under the Harbor Maintenance Tax are deposited in the Harbor Maintenance Trust Fund and may be withdrawn from that Fund only for the designated purposes of maintaining and operating port facilities. As a fee that exacts "compensation * * * for services properly rendered," it is "in no sense a duty on exportation" and is "not an infringment of the constitutional provision" (*Pace* v. *Burgess*, 92 U.S. 372, 375-376 (1876)).

ARGUMENT

THE HARBOR MAINTENANCE TAX DOES NOT VIOLATE THE EXPORT CLAUSE OF THE CONSTITUTION

This Court has long recognized the distinction between an unconstitutional "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901), quoting *Pace* v. *Burgess*, 92 U.S. 372, 375 (1876). "[R]evenue measures that operate only to compensate a government for benefits supplied" are not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from

its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)).[4]

1. In determining whether a charge imposed on the use of commercial facilities provided by the government constitutes a "tax" within the proscription of the Export Clause or a permissible charge for "services properly rendered," the initial inquiry is whether the primary purpose of the charge is to earn revenue: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 376. See also *Fairbank* v. *United States*, 181 U.S. at 304; *Moon* v. *Freeman*, 379 F.2d 382, 391 (9th Cir. 1967). In distinguishing between taxes and user fees, courts look to "the revenue's ultimate use, asking whether it provides a general benefit to the public * * * or whether it provides more narrow benefits to regulated companies or defrays the agency's cost of regulation." *Hager* v. *City of West Peoria*, 84 F.3d 865, 870 (7th Cir. 1996), quoting *San Juan Cellular Tel. Co.* v. *Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).

[4] The court of appeals did not dispute that Congress may properly exercise its power under the Commerce Clause to "recoup the costs of the services" provided to users of ports and harbors (Pet. App. 27a). A burden upon exports imposed pursuant to a valid exercise of Congress's power to regulate commerce does not violate the Export Clause. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 78-80 (1908). The powers to tax and to regulate commerce are independent sources of legislative authority. See *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 75, 76 (1946); *Board of Trustees of Univ. of Illinois* v. *United States*, 289 U.S. 48, 58 (1933). The Export Clause "does not condemn or invalidate charges or taxes * * * merely because they affect exportation indirectly or remotely." *William E. Peck & Co.* v. *Lowe*, 247 U.S. 165, 174 (1918). See also *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 447 (1924); *National Paper & Type Co.* v. *Bowers*, 266 U.S. 373, 377 (1924); *Turpin* v. *Burgess*, 117 U.S. 504, 505 (1886).

Enhancement of the general revenue is plainly not an overt or disguised purpose of the Harbor Maintenance Tax.[5] This statutory fee on "any port use" (26 U.S.C. 4461(a)) was enacted as part of a comprehensive legislative program providing for the operation and development of harbor and port facilities throughout the Nation. As Judge Mayer noted in dissent in this case (Pet. App. 32a-33a), Congress expressly contemplated that the charges imposed by the Harbor Maintenance Tax represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1985) ("the committee amendment imposes new port user charges"). In imposing this fee on the commercial use of ports of the United States, Congress

[5] In construing the Export Clause, the Court has emphasized that "we must regard things rather than names." *Fairbank* v. *United States*, 181 U.S. at 304. See *Cooley* v. *Port of Philadelphia*, 53 U.S. (12 How.) 299, 313 (1852) ("certainly it is the thing, and not the name, which is to be considered"); *Brock* v. *Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 489 (D.C. Cir. 1986), cert. denied, 481 U.S. 1013 (1987). The fact that a fee is labeled a "tax" or is placed in the Internal Revenue Code is irrelevant to the question whether the assessment and collection of the fee violates the Export Clause of the Constitution. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 596 (1884) ("[T]he act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace* v. *Burgess*, 92 U.S. at 375 (disregarding the label "tax" in concluding that a stamp tax was a permissible fee and not an impermissible tax on exports within the meaning of the Export Clause).

explained that "[t]he taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels." S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985).

Consistent with this clear statement of legislative purpose, the fees collected under this statute are deposited in the specially designated Harbor Maintenance Trust Fund, from which they may be expended only for port and harbor maintenance. 26 U.S.C. 9505(c). The funds in this Trust may not be used to support the general welfare. See *Massachusetts* v. *United States*, 435 U.S. at 448; Pet. App. 36a (Mayer, J., dissenting) ("The government has been true to this constraint.").[6] The monies in the Harbor Maintenance Trust Fund are invested in "interest-bearing obligations of the United States." 26 U.S.C. 9602(b)(1). Interest earned on the bonds is paid directly to the Trust Fund and is not retained by

[6] The placement of the Harbor Maintenance Tax and the Harbor Maintenance Trust Fund in the Internal Revenue Code is consistent with other, similar legislation in which Congress has assessed use-related charges to fund specific federal projects that benefit particular users of federal services. H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 3, at 11-13 (1985). See, *e.g.*, 26 U.S.C. 9502 (Airport and Airway Trust Fund), 9503 (Highway Trust Fund), 9504 (Aquatic Resources Trust Fund), 9506 (Inland Waterways Trust Fund), 9511 (National Recreational Trails Trust Fund). In rejecting a constitutional challenge to the federal aviation use fee in *Massachusetts* v. *United States*, 435 U.S. at 448, the Court emphasized that the Airway Trust Fund was created "[t]o assure that the revenues from these user taxes would be expended only for the expansion, improvement and maintenance of the air transportation system * * * ."

the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3). "This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 (1989).[7]

The fact that this Trust Fund currently enjoys a positive balance does not mean, as the courts below erroneously concluded (Pet. App. 57a-58a), that the Harbor Maintenance Tax is a disguised and proscribed "tax" rather than a valid "fee" for services. See *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984). The precise level of funding required each year for the development, maintenance, and operation of harbor resources obviously fluctuates over time. Realizing that costs usually cannot be projected with certainty, Congress was careful "to allow for *not more than 100 percent* of the eligible operation and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States to be appropriated from the navigation trust fund." H.R. Conf. Rep. No. 966, 101st Cong., 2d Sess. 59 (1990) (emphasis added). As this Court explained in *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, in rejecting the same contention adopted by the court of appeals in this case:

> Even if the revenues in any one year exceeded the outlays, it would not follow that the tax is

[7] In upholding challenged user fees, courts have frequently emphasized that the revenues from the fee were deposited in a dedicated trust fund and were applied only to cover the costs of government facilities and services. See, *e.g.*, *Morgan's Steamship Co.* v. *Louisiana Bd. of Health*, 118 U.S. 455, 461 (1886); *Head Money Cases*, 112 U.S. at 596.

> invalid as applied. * * * [T]he validity of the tax [is] determined by comparing total revenue with total outlays: *i.e.*, a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years.

See also *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 522 (11th Cir. 1990) ("given the long term nature of maintaining and developing an airport, it was appropriate * * * to factor in future development plans when setting user fees"), cert. denied, 498 U.S. 1120 (1991).[8]

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[8] For the most recent year reflected in the record, the Harbor Maintenance Trust Fund had a year-end surplus ($452 million) that was smaller than the expenditures from the Fund for that year ($497 million). J.A. 104. The emphasis of the court of appeals on whether a "surplus" exists in the Fund is misplaced, for this is not a case in which a "surplus" is paid into the general revenues of the United States. Instead, as the dissenting judge emphasized, the relevant fact is that the monies placed in the Fund may be used *only* for navigation projects (Pet. App. 36a-37a).

The Secretary of the Army has reported to Congress that the Harbor Maintenance Tax is "meeting its objectives of financing 100 percent of the eligible [operating and maintenance] expenditures made on behalf of commercial navigation for the St. Lawrence Seaway Development Corporation and the Army Corps of Engineers." J.A. 109. The Secretary suggested that Congress could address the "growing surplus" of the Fund either by reducing the rate of the Harbor Maintenance Tax or by adding to the navigation projects funded with its revenues. J.A. 109-110. See note 2, *supra*. By contrast, the decision of the court of appeals in this case would effectively abolish the Trust Fund for, by voiding the Harbor Maintenance Tax in its entirety, it would cause the entire balance of the Fund to be fully expended in less than one year.

The decision of the court of appeals thus seriously misapplies this Court's precedents in concluding that the charges imposed by the Harbor Maintenance Tax represent an unconstitutional "duty" masquerading as a "fee." As the dissent instead correctly emphasizes (Pet. App. 36a-37a), the relevant fact is that the fees may not be expended *at any time* for any purpose other than the operation and maintenance of harbor and port facilities for commercial navigation. See 26 U.S.C. 9505(c); H.R. Rep. No. 881, 101st Cong., 2d Sess. 288 (1990); note 6, *supra*. The Export Clause does not proscribe "revenue measures that operate only to compensate a government for benefits supplied" (*Massachusetts* v. *United States*, 435 U.S. at 462). Charges for "services that do not hamper, but indeed, aid" commerce are not proscribed as "taxes" on articles exported. *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515, 1522 (E.D. La. 1988), aff'd, 874 F.2d 1018 (5th Cir. 1989), cert. denied, 495 U.S. 932 (1990).

The Harbor Maintenance Tax was enacted to provide funds "for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce." S. Rep. No. 228, *supra*, at 5. Congress concluded that "[s]uch additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." *Ibid.* The Harbor Maintenance Tax was enacted to ensure that those who benefit from such facilities bear the costs of their operation and maintenance. As a fee that exacts "compensation * * * for services properly rendered," the Harbor Maintenance Tax is "in no sense a duty on exportation" and does not "infringe[] * * * the

constitutional provision" (*Pace* v. *Burgess*, 92 U.S. at 375-376).

2. The decisions of this Court establish that a user fee does not constitute a proscribed "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." *Massachusetts* v. *United States*, 435 U.S. at 464. See also *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-720 (1972). When, as in the present case, the statute was enacted with a "specific declaration by Congress that the [fees collected] are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that" the fee, in reality, is impermissibly designed to raise general revenues. *United States* v. *Sperry Corp.*, 493 U.S. at 60.[9]

The court of appeals did not conclude that the Harbor Maintenance Tax discriminates against exports. Nor did the court conclude that the fee imposed by the statute is excessive in relation to the costs of

[9] As this Court explained in *Fairbank* v. *United States*, 181 U.S. at 285:

> The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear.

Respondent thus bears a heavy burden in seeking to establish that the Act violates the Constitution. See *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827).

the benefits conferred (Pet. App. 17a).[10] Instead, the court concluded that the statutory fee is unconstitutional because it is not based upon some "fair approximation of use" of the ports of the United States (*id.* at 23a). Each of the three rationales offered by the court of appeals in support of its conclusion is incorrect and conflicts with the decisions of this Court.

a. The court of appeals stated that the statutory fee is not based upon some "fair approximation of use" because it is imposed on exporters and other parties who ship goods rather than on "the ship owners" who are the "direct users" of the Nation's ports and harbors (Pet. App. 18a, 19a). The court of appeals provided no citations of authority to support this proposition, however, and no such authority exists.[11]

[10] The Harbor Maintenance Tax clearly satisfies these two prongs of the test used by this Court in determining whether the exaction is a permissible user fee. The statutory fee applies to all importers, exporters and domestic shippers (26 U.S.C. 4461(c)) and thus does not discriminate against exporters. And, for the reasons described above (see notes 2 & 8, *supra*), the fees collected are not excessive in relation to the expenditures made by the government. Although the Trust Fund currently enjoys a positive balance, that fact does not affect the constitutionality of the fee. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. at 470 n.25; Pet. App. 44a (Mayer, J., dissenting). For example, in *New Hampshire Motor Transport Ass'n* v. *Flynn*, 751 F.2d 43, 47 (1st Cir. 1984), the court upheld a user fee even though the monies collected were to be used to fund projects not yet commenced rather than to repay the government for past services rendered.

[11] Respondent argued in the court of appeals that only a "direct beneficiary" of a government program may be subjected to a fee for the costs of that program. Respondent claimed that such a rule was established in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). That

Indeed, this Court has expressly rejected the very rationale on which the court of appeals relied. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, the Court explained that it

> has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. * * * All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

In upholding a government fee imposed on the use of airport facilities in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. at 714 (emphasis supplied), the Court emphasized that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. *In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation.*"

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decision, however, concerned whether a particular agency fee had been authorized by a particular statute. See *id.* at 342-344. The Court "recognized that it was not announcing universal definitions of 'tax' and 'fee' " but was "simply determining the meaning of these terms in a particular context quite different from that presented in" cases involving the limitations on taxing authority under the Export and Import-Export Clauses. *Union Pac. R.R.* v. *Public Utility Comm'n*, 899 F.2d 854, 861 (9th Cir. 1990). See also *San Juan Cellular Tel. Co.* v. *Public Serv. Comm'n of Puerto Rico*, 967 F.2d at 686; *Maine* v. *Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

Here, as in *Evansville*, it is the use of government-provided "facilities that give[s] rise to the obligation" to pay the fee. As Judge Mayer correctly concluded in dissent in this case, because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statutes, "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (Pet. App. 42a). The court of appeals improperly ignored the holding of this Court in *Evansville* in reaching its erroneous decision in this case.

The court of appeals similarly erred in ignoring the determination of Congress that it is the exporters and other shippers, and not "the ship owners" (Pet. App. 19a), who are the "direct beneficiar[ies]" of port maintenance services. Congress enacted the Harbor Maintenance Tax to avoid the harsh consequences that inadequate and deteriorating ports and harbors would have for commercial shippers. S. Rep. No. 126, *supra*, at 8. The fee on "port use" was designed specifically to provide funding to enhance the facilities available for transporting the goods of commercial shippers. In assessing the port use fee against the shippers who use these facilities, Congress rationally concluded that "a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures." S. Rep. No. 228, *supra*, at 5.[12] The court of

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[12] Congress noted that "[t]he provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage." S. Rep. No. 126, *supra*, at 7.

appeals lacked any plausible basis for rejecting the determination of Congress that shippers are the "direct beneficiaries of such expenditures" (*ibid.*).[13]

b. The court of appeals also erred in holding that the statutory fee on port use is not based upon a "fair approximation of use" because it is assessed on the *value* of goods being shipped rather than on tonnage or some other factor (Pet. App. 21a-22a). That holding conflicts with numerous decisions of this Court, including decisions in which this Court has expressly approved use fees based upon the value of goods being shipped. See *United States* v. *Sperry Corp.*, 493 U.S. at 60.

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60. Recognizing that, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system," the Court has specifically "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation.'" *Id.* at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 468.

For example, flat registration fees that do not vary based upon the amount of use have been sustained if that fee recovers a "fair approximation" of the costs of the benefits supplied. *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716-717. Fees for the use of transportation resources based upon the "fair market value" of the vehicle or upon the gross revenues of the transportation service have also been sustained. See *id.* at 715-716; *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Auth.*, 906 F.2d at 516.

Mileage or tonnage is not a necessary factor in calculation of a transportation use fee. As the Court emphasized in rejecting the challenge to the flat registration fee assessed in *Massachusetts* v. *United States*, 435 U.S. at 463, quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950), the validity of a use fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." Accord *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716. Even though "[c]omplete fairness" would require that the use fee be calibrated based upon "every factor affecting appropriate compensation" for the government services provided, "[t]hese factors * * * are so

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[13] Congress considered imposing the port use fee on vessel operators, rather than shippers, but concluded that this was not feasible because the fee is imposed on the value of the goods and operators generally have little or no knowledge or documentation concerning the value of the cargo they carry. See, *e.g.*, *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 91 (1985) (*Senate Hearing*) (statement of President, American Waterways Operators, Inc.). Shippers are the best source of this information and "already have to file declarations with the U.S. government regarding imports and exports." *Id.* at 104-105 (statement of Marc J. Fink on behalf of 28 ocean common carriers of freight). Based on the information gathered in the detailed legislative hearings, Congress reasonably determined that shippers are the direct beneficiaries of the program and the proper source of the information needed to assess the fee. Respondent has shown no basis for doubting the obvious fact that *if* the fee had instead been imposed on vessel operators the costs would have been passed along to the shippers in any event.

countless that we must be content with 'rough approximation rather than precision.'" *Capitol Greyhound Lines* v. *Brice*, 339 U.S. at 546, quoting *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 422-423 (1947).

The statutory fee for port use satisfies the requirement that it not "be unreasonable in amount for the privilege granted." The funds obtained through collection of the fee recover the cost incurred in providing port services (see notes 2 & 8, *supra*), and the fee is imposed on the parties whose goods are enhanced in value by these services. A recovery of a portion of the value of the benefits conferred—from those who receive that value—is not "unreasonable in amount for the privilege granted." In holding to the contrary in this case, the court of appeals failed to adhere to this Court's consistent admonition that the validity of the fee is to be "judged by its results, not its formula."

The Court has often emphasized that perfection in the allocation of cost among those who benefit is not required. For more than a century, the Court has recognized that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. 580, 595 (1884). It is "the amount of the tax, not its formula, that is of central concern." *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716-717. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, for example, the Court upheld a federal fee imposed for use of the Iran Claims Tribunal that was based soley on the value of the recovery. In upholding that *ad valorem* fee, the Court specifically rejected the notion "that the amount of a user fee must be

precisely calibrated to the use that a party makes of Government services." *Ibid.* It is thus now "beyond dispute that an ad valorem charge can be a user fee" (Pet. App. 41a (Mayer, J., dissenting), citing, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992)).

Congress reasonably concluded that an *ad valorem* fee is appropriate in the present context as well. Such a formula reasonably charges the cost of port operations to those who benefit from actual use of the ports. Moreover, allocating cost based upon the value of goods being shipped substantially reduces administrative cost and burdens.[14] Congress was aware that the Customs Service "has a strong presence at ports of entry and is experienced at appraising imported merchandise." S. Rep. No. 228, *supra*, at 10. Because the core information collected by the Customs Service concerns the value of the cargo, structuring the Harbor Maintenance Tax on an *ad valorem* basis reduces administrative cost by utilizing the existing data collection system.

Extensive testimony was presented to Congress favoring such an *ad valorem* fee over a port-specific fee or a flat tonnage fee. See, *e.g.*, *Senate Hearing*, *supra*, at 47; *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Comm. on Ways*

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[14] The Court noted in *Massachusetts* v. *United States*, 435 U.S. at 466, that, "[i]f the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system."

and Means, 99th Cong., 1st Sess. 59 (1985) (*House Hearing*). Shippers of low-value cargo testified that any fee for port use that was calculated upon tonnage would "disproportionately * * * affect bulk cargo marketability when compared to [its] impact on containerized cargo. It also would disadvantage export dependent ports in contrast to import dependent ports." *Senate Hearing*, *supra*, at 19; see *House Hearing*, *supra*, at 59. In imposing the statutory fee on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits) from the enhancement of port facilities and that value is therefore "the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." S. Rep. No. 228, *supra*, at 5-6.

In overruling the method of "fair approximation" that Congress reasonably elected to employ in imposing this fee for port use, the court of appeals thus disregarded not only the decisions of this Court but also the clear legislative record. In particular, the court failed to follow the well-established rule, summarized by this Court in *Fairbank* v. *United States*, 181 U.S. at 304, quoting *Pace* v. *Burgess*, 92 U.S. at 375-376, that

> proper fees * * * are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which

> can be adopted. * * * [H]aving due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive or that it amounts to an infringement of the constitutional provision * * * .

c. The court of appeals further erred in concluding that the statutory port use fee is objectionable because "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (Pet. App. 22a). The court's reasoning would evidently require Congress to establish separate fees and trust funds for each port. But this Court rejected an identical contention in sustaining a federal fee for airport services in *Massachusetts* v. *United States*, 435 U.S. at 468. The Court explained that, even though a user may actually land or take off from only a limited number of facilities, charging a nationally uniform fee that contributes to a national fund for airport services is permissible because nationwide "services are available for their use if needed and * * * the provision of the services makes the airways safer for all users." *Ibid.* See also *Maine* v. *Department of Navy*, 973 F.2d at 1013-1015 (upholding a state fee as a "fair approximation" of the use of state services when the parties benefit from the availability of the services as well as from any actual use). The decision of the court of appeals in this case conflicts with this settled rule.

3. Respondent ultimately acknowledges that Congress *could* have adopted a permissible user fee for

port facilities. Respondent contends only that such a fee should be based upon tonnage or other factors that respondent thinks might more closely relate the costs to be recovered to the benefits conferred (Br. in Opp. 20).[15] As Judge Mayer emphasized in dissent (Pet. App. 39a), however, Congress rationally determined that an *ad valorem* fee is "the only acceptable basis on which to impose such charges" for port services (S. Rep. No. 228, *supra*, at 5-6). In rejecting that determination, the court of appeals failed to honor the wide "latitude of discretion which the legislature is entitled to exercise in the selection of the" method for calculating a fee. *Fairbank* v. *United States*, 181 U.S. at 304.

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[15] Respondent states that Congress could enact "a *bona fide* user fee to replace" the Harbor Maintenance Tax and that "[t]here are many ways by which this could be done" (Br. in Opp. 20).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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